

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:MCT:DET:POSTF121018-02

MTHammoud

date: *MAY 17, 2002*

to: [REDACTED], Team Coordinator

from: Associate Area Counsel, LMSB, Detroit, Michigan

subject: [REDACTED] Inc., NOL Carryback

This memorandum responds to your request for assistance regarding the above subject. This memorandum should not be cited as precedent.

ISSUE

Whether the taxpayer may amend its timely filed claims for refund after the statute of limitations has expired.

CONCLUSION

A timely filed original claim for refund may be amended after expiration of the statute of limitations when the amendment is based on the same facts stated in the original claim and requires no additional investigation. Accordingly, the taxpayer may amend its claims, so long as the amendments do not raise any new issues.

FACTS

[REDACTED] Inc., hereinafter referred to as the taxpayer, through its wholly owned subsidiary, the [REDACTED] Company, owns the [REDACTED]. The [REDACTED] Company ([REDACTED]) operates the [REDACTED], a [REDACTED] company wholly owned by [REDACTED], operates the [REDACTED]. The consolidated income tax returns filed by the taxpayer for the [REDACTED], [REDACTED] and [REDACTED] tax years reflected net operating losses.¹

¹ Only the [REDACTED] tax year is relevant to the issue discussed in this memorandum.

Over the years, the taxpayer also filed several claims for tentative refunds, Form 1139, and amended tax returns, Form 1120X,² reflecting carryback of these losses to prior years' income tax returns. On [REDACTED] the taxpayer filed both a Form 1139 and a Form 1120X for the [REDACTED] tax year, reflecting a carryback from the [REDACTED] tax year in the amount of \$[REDACTED]. This loss was tentatively allowed by the appeals division of the Internal Revenue Service in its consideration of the taxpayer's [REDACTED] through [REDACTED] tax years.³

The underlying reason for the taxpayer's Forms 1139 and Forms 1120X stems from the allocation of [REDACTED] revenue and expense between the [REDACTED] and [REDACTED]. The [REDACTED] and [REDACTED] audited the [REDACTED] and [REDACTED] income tax returns of the [REDACTED] Company and proposed adjustments to the income and revenue allocations made by the taxpayer. The allocation issue was raised on two previous occasions covering the [REDACTED] through the [REDACTED] tax years and resolved at the [REDACTED] level. The taxpayer did not agree with the adjustments proposed for the [REDACTED] through [REDACTED] tax years and, once again, filed for [REDACTED] consideration.

The taxpayer's [REDACTED] income tax return was examined by the Internal Revenue Service (Service) and the amount of the loss was adjusted. On [REDACTED] the taxpayer timely⁴ filed an amended return, Form 1120X, increasing the loss (NOL) for that year to \$[REDACTED]. On [REDACTED] the taxpayer then filed another Form 1120X for [REDACTED] reflecting the NOL at \$[REDACTED].⁵

² Based on the information provided to our office, it appears the taxpayer filed these as a protective measure, dating back to [REDACTED]. To the extent not pertinent to the resolution of the issue involved in this memorandum, these claims for carryback losses will not be discussed. However, it is important to note all the claims filed were based on the allocation of revenue and expenses between the [REDACTED] and [REDACTED], discussed *infra*.

³ The Audit Statement to the report prepared by the appeals division specifically stated as follows: "THE TENTATIVE ALLOWANCES ATTRIBUTABLE TO [REDACTED] & [REDACTED] SHOWN ON THE ATTACHED SCHEDULE No. 1 ARE SUBJECT TO CORRECTION UPON DETERMINATION OF THE CORRECT AMOUNT OF THE CARRYBACKS."

⁴ Based on a Consent to Extend the Time to Assess Tax, Form 872, the [REDACTED] statute of limitations was extended to [REDACTED].

⁵ Our office did not receive a Form 872 extending the statute between [REDACTED] and [REDACTED]. For purposes of this memorandum, however, we presume a Form 872 was obtained for that time period, as our office received a Form 872 executed in [REDACTED] extending the statute until [REDACTED]. If our presumption is incorrect, please notify us immediately.

In [REDACTED] the Service's appeals division resolved the examination of the [REDACTED] tax year and determined the loss for that year to be \$ [REDACTED]. The resolution included a provision for the taxpayer to file refund claims for certain issues, including the revenue and expense allocation issue.

On [REDACTED] the taxpayer timely filed amended returns for the [REDACTED] and [REDACTED] tax years⁶, carrying back the NOL from [REDACTED]. The [REDACTED] Form 1120X reflected a loss of \$ [REDACTED] and the [REDACTED] Form 1120X reflected a loss of \$ [REDACTED].

On [REDACTED] [REDACTED] made a determination with respect to the allocation issue, providing full correlative relief to the taxpayer. Based on this determination, the Service determined the [REDACTED] NOL should be increased to \$ [REDACTED]. Accordingly, exam determined the [REDACTED] carryback loss, consisting entirely of specified liability losses, should be increased to \$ [REDACTED] and the [REDACTED] carryback loss, taking into consideration the tentative allowance of \$ [REDACTED] should be increased to \$ [REDACTED]. Since the statute of limitations for [REDACTED] expired on [REDACTED], exam requested our advice with regard to whether the adjustments may be made.

DISCUSSION AND ANALYSIS

Internal Revenue Code section 6402(a) provides that in the case of an overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment against any outstanding liability for any internal revenue tax owed by the person who made the overpayment and shall refund the balance to such person.

As a general rule, I.R.C. § 6511(a) provides that a claim for credit or refund must be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever expires later.

Internal Revenue Code section 6511(b)(1) provides that no credit or refund may be allowed or made after the expiration of the period of limitation for filing a claim for credit or refund, unless such claim is filed by the taxpayer within the period prescribed in I.R.C. § 6511(a).

Treasury Regulation section 301.6402-2(b)(1) provides that no refund or credit will be allowed after the expiration of the period of limitations applicable to the filing of claim therefor except upon one or more of the grounds set forth in a claim filed before the expiration of such period. The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis of the claim.

⁶ Based on the Form 872 provided to our office, the statute for [REDACTED] was extended to [REDACTED].

Internal Revenue Code § 6511(d)(2) provides that if the claim for credit or refund is attributable to a net operating loss carryback, then in lieu of the 3 year period of limitation prescribed in I.R.C. § 6511(a), "the period shall be that period which ends 3 years after the time prescribed by law for filing the return (including extensions thereof) for the taxable year of the net operating loss ... which results in such carryback, or the period prescribed in subsection (c) in respect of such taxable year, whichever expires later."

Pursuant to I.R.C. § 6511(c), if an agreement is made to extend the statute of limitations, as provided by I.R.C. § 6501(c)(4), then the period for filing a claim for credit or refund shall not expire prior to six months after the date set forth in the agreement.

Based on the information provided to our office, it appears the taxpayer's claims for refund were timely filed.⁷ The last Form 872 executed by the taxpayer extended the period of limitations until at least [REDACTED] and the Forms 1120X carrying back the [REDACTED] loss to [REDACTED] and [REDACTED] were filed within that time period. Thus, since the determination reached by the [REDACTED] resulted in an increase to the taxpayer's NOL for [REDACTED], the only issue remaining is whether the taxpayer may now, after expiration of the statute, amend the Forms 1120X filed for [REDACTED] and [REDACTED] by increasing the amounts to be carried back.

In general, a timely filed claim for refund may be amended after the period of limitations for filing a claim has expired when the amendment is based on the same facts stated in the original claim and requires no additional investigation. Mutual Assurance, Inc. v. United States, 56 F.3d 1353 (11th Cir. 1995), acq. in result only, AOD 1999-104; Ideal Basic Industries v. Commissioner, 404 F.2d 122 (10th Cir. 1968); and Reynolds v. United States, 92-2 USTC ¶ 50,347 (E.D. Wis. 1992). No amendment of the claim for refund is allowed, however, after final action is taken by the Service. Cf. United States v. Memphis Cotton Oil Co., 288 U.S. 62 (1932). The amendment must simply clarify matters in the original claim.

In the instant case, any purported amendment to the [REDACTED] and [REDACTED] claims by the taxpayer⁸ would simply be to increase the amounts of the NOL carryback. The claims would not be raising any new issues, as they will be based on the [REDACTED] allocation for revenue and expenses. Although the Service tentatively allowed the [REDACTED] loss carryback, such action was clearly not intended to be the Service's final determination for that year. Accordingly, and given the fact the Service was aware of the taxpayer's request for [REDACTED], the taxpayer may amend these claims by increasing the amount of the NOL carryback.

⁷ The claim, Form 1120X, for the [REDACTED] tax year does not seek a refund.

⁸ To date, no amendments have been filed by the taxpayer for the [REDACTED] and [REDACTED] 1120X forms filed for each year in [REDACTED]

This advice is subject to post review by our National Office and should not be relied upon for a period of 30 days.

We hope this is fully responsive to your request for our advice. Should you have any questions or require any further assistance, please feel free to contact the undersigned at (313) 237-6432.

DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

Associate Area Counsel
(Large and Mid-Size Business)

By : _____
MESO T. HAMMOUD
Attorney (LMSB)